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CHARLES ELMORE CROP

United States Supreme Court

OCTOBER TERM, 1944.

No. 1029

MARYLAND CASUALTY COMPANY,
Petitioner,

vs.

COUNTY OF ALLEGHENY, a Political Subdivision of the Commonwealth of Pennsylvania.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MARYLAND CASUALTY COMPANY,
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Supreme Court of the United States

OCTOBER TERM, 1944

No. .....

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Petitioner,

vs.

COUNTY OF ALLEGHENY, a Political Subdivision of the Commonwealth of Pennsylvania.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Maryland Casualty Company, by its counsel, prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the case entitled, "County of Allegheny, a political subdivision of the Commonwealth of Pennsylvania, Plaintiff and Appellant, *v.* Maryland Casualty Company, a Maryland Corporation, Defendant, Appellee," reversing the decision by the United States District Court for the Western District of Pennsylvania.

Opinion Below.

The opinion of the United States District Court for the Western District of Pennsylvania (R. 2154) is reported in 42 Fed. Supp. 672. The opinion of the Circuit Court of

Appeals for the Third Circuit was filed December 22, 1944 (R.) and is not yet reported.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; 28 U. S. C. A. Section 347 (a).

Questions Presented and Reasons for the Writ.

(1) Whether the Circuit Court of Appeals in this case has decided an important question of local Pennsylvania law in conflict with applicable Pennsylvania decisions in that

(a) the Circuit Court of Appeals construed and applied the Pennsylvania Equity Rule 66 to the facts of this case in conflict with decisions of the Supreme Court of Pennsylvania:

(b) it applied Section 69(2) of the *Restatement, Judgments* by the American Law Institute as the law of Pennsylvania applicable to the facts of this case, and contrary to and in conflict with the decisions of the Supreme Court of Pennsylvania.

(2) Whether the Circuit Court of Appeals in this case has decided an important question of local Pennsylvania law in conflict with the applicable Pennsylvania statute (Section 49 of the Sales Act of Pennsylvania, 69 P. S., Sec. 259) and applicable Pennsylvania decisions thereunder, in that its determination holds that a seller need not comply with the statute by giving notice of breach where the giving of such notice would be a "vain act", *i.e.*, where the buyer has been adjudicated a bankrupt.

Rules and Statutes Involved.

Pennsylvania Equity Rule 66 (adopted by the Supreme Court of Pennsylvania, May 30, 1924) reads as follows:

> "If the judge or referee, upon the close of plaintiff's evidence, shall be of opinion that the case made in the bill has not been sustained, he shall have power, without hearing evidence on behalf of defendant, to enter a decree of dismissal which shall have the effect of a nonsuit at law. If exceptions are filed to such a decree, and the court or referee refuses to change it, it shall become a final decree for all purposes, and subject to appeal exactly as if it had been entered after a hearing of both parties."

Section 69(2) of the *Restatement, Judgments* by the American Law Institute reads as follows:

> "(2) Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action."

Section 49 of the Pennsylvania Sales Act (69 P. S. Sec. 259) provides in part:

> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty, within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor."

Statement.

This action by the County of Allegheny, a political subdivision of the Commonwealth of Pennsylvania, against Maryland Casualty Company, was predicated upon a bond issued by the latter on March 26, 1931, and was tried before a jury in the Western District of Pennsylvania, and resulted in a general verdict and judgment (R. 1806) for the County in the sum of $251,266.67, representing the full principal amount of the bond, with interest. Thereafter, on motion of Maryland Casualty Company, Petitioner herein, the Trial Judge, Gibson, D. J., vacated the County's verdict and entered judgment for Maryland Casualty and also granted a new trial (R. 2153). The County thereupon appealed to the Circuit Court of Appeals, and the appeal was dismissed upon the ground that the grant of a new trial, not having been expressly conditioned to be effective upon reversal of the judgment, had automatically vacated the judgment. A Petition for Writ of Certiorari to the Supreme Court of the United States was then filed by the County, October Term, 1942, No. 774. The Petition was denied, April 12, 1943, 318 U. S. 787. Upon remand, the District Court entered a new judgment n.o.v. for Maryland Casualty and granted a new trial conditionally as an alternative or in *succedaneum* (R. 2188). An appeal was then taken by the County to the Circuit Court from the judgment n.o.v. so entered (R. 2193). The Circuit Court, after hearing the argument, reversed the judgment n.o.v. entered by the District Court, and filed an opinion December 22, 1944 (R.). From the judgment of the Circuit Court, this Petition is filed.

The action was originally instituted in the State Court in April, 1937, and was then removed to the United States

District Court for the Western District of Pennsylvania. In July, 1939, the County filed an amended complaint (R. 3), to which an answer was filed by Maryland Casualty (R. 62), and a reply filed by the County (R. 79).

The bond on which the action is based, was conditioned upon the faithful performance of the contract which the County had awarded to Poole Engineering & Machine Company (herein referred to as "Poole") for the delivery of 1100 American voting machines, to be in accordance with specifications attached to the contract. All the 1100 voting machines were delivered by Poole to the County by October, 1931, and admittedly "performed with general satisfaction" in the primary and general elections of 1931. In January, 1932, Poole was adjudicated a bankrupt. In June and December, 1932, the County gave written notice to Poole's trustee in bankruptcy of certain minor alleged defects in the machines. Claiming fundamental defects in the machines and without prior demand on Poole's trustee or on Maryland Casualty, Petitioner herein, the County expended in excess of $800,000 to redesign and reconstruct the machines. Approximately $126,000 is claimed to have been expended in 1933, and approximately $700,000 in 1934 and 1935. To recover the amount covered by the bond of Maryland Casualty, the County instituted the present action.

As a third separate defense (R. 64), Maryland Casualty pleaded a prior action, *Bassett, et al.* v. *Armstrong, et al.*, 309 Pa. 296, 163 Atl. 525 (hereinafter called the "*Bassett* case"), as *res judicata* of all matters in the County's amended complaint. Said defense was proven at the trial by the introduction into evidence of Defendant's Exhibits D-41-a to D-41-z (R. 1917-2100, inc.), being the entire record in the Court of Common Pleas of Allegheny County, Commonwealth of Pennsylvania, of an action instituted in

October, 1931, wherein Ada V. Bassett, a taxpayer, together with some intervening taxpayers were plaintiffs, and Poole and the County Commissioners, County Controller and County Treasurer of Allegheny County were co-defendants. The complaint in the *Bassett* case was a taxpayers' bill (concerning itself with the same 1100 voting machines described above and involved in this case), and prayed that the County and its officers be enjoined from (a) paying to Poole any sums unpaid on the machines delivered; (b) receiving any further machines under the contract with Poole, and (c) that the County Commissioners be required to take action against Poole for breach of its contract with the County and that they proceed on the bond of Maryland Casualty (R. 1931-1933). The Bassett complaint alleged (R. 1924, 1925) various defects in the machines, being of the same type, extent and nature as the alleged defects in the complaint in the instant suit (Schedule of Breaches annexed to the instant complaint, R. 26-44, inc.). The County appeared in the *Bassett* case (R. 1943, 1945), and by answer of its County Commissioners (Defendant's Exhibit D-41-k; R. 1954-1961, inc.), stated specifically (R. 1955) that the machines functioned satisfactorily at the 1931 primary and general elections, and denied (R. 1955, 1956) the alleged defects in the machines, taking up each of the alleged defects set forth in the complaint and specifically contradicting it. The County prayed that the bill be dismissed (R. 1960).

The *Bassett* case was tried from December 18, 1931 to December 22, 1931 before the Chancellor, and the entire testimony and proceedings are in evidence as Defendant's Exhibit D-41-bb (R. 1971-2077, inc.). The County Solicitor was present and participated in the trial. At the end of plaintiff's case, defendant Poole moved to dismiss. On

December 29, 1931, the Chancellor filed his opinion and order (Defendant's Exhibit D-41-s, R. 2078-2082, inc.), which dismissed the complainant's bill. In the course of his opinion, the Chancellor stated (R. 2081):

> "In the light of the manner in which one machine functioned and the efficiency of the other, except for the judicial offices referred to, it appears to the Chancellor, and we so find, that there is no inherent defect in the machine. Wide latitude was granted plaintiffs in bringing the machines into Court and submitting them to tests which as nearly as may be, duplicated conditions of a polling place. Careful review of the proceeding fails to disclose evidence of the inherent defects of the machines. * * *
>
> "On Plaintiffs' testimony, we would be compelled to find, we think, as a fact that the machines are efficient for their intended purpose and that they conform to the requirements of the contract and specifications and the law existing at the time the contract was made; and so finding, would be required to conclude as a matter of law that the county must pay the balance due."

On January 5, 1932, Bassett filed exceptions, (R. 2084-2092, inc.) to the decree of dismissal, to the Court en banc in accordance with the provisions of Pennsylvania Equity Rule 66. Those exceptions were overruled after hearing. An order dismissing the bill was affirmed (R. 2094). The Court en banc, in its opinion, states (R. 2093, 2094):

> "A subsequent adjournment was taken to December 28th, 1931. Meanwhile, upon petition of Poole Engineering & Machine Company, a writ of peremptory mandamus was granted, directing the County Commissioners to pay to the petitioner in that case the balance claimed to be due on the voting machines. Pursuant to the writ, an order for payment was made and the whole amount has been paid.

> "It at once appears from a scrutiny of the pleadings and the evidence that the issue raised has become a moot question, and argument or discussion thereof purely academic. * * *
>
> "The exceptions, in our opinion, must be dismissed, and we therefore affirm the Order made on December 29th, 1931, dismissing the bill, upon the opinion filed by the Chancellor, and direct the entry of said Order as a final decree."

From the order of the Court en banc, Bassett appealed (again pursuant to Equity Rule 66) to the Supreme Court of Pennsylvania (Defendant's Exhibit D-42-a; R. 2100), and the County filed notice of appearance in the Supreme Court (R. 2115). New County Commissioners having come into office, they were substituted in the place of the original named Commissioners (Defendant's Exhibit D-42-i; R. 2119-2122, inc.). The County filed a brief in the appeal proceedings (Defendant's Exhibit D-43-b; R. 2135-2136), contending for the first time that its previous position had been a mistaken one, concluding that the machines were defective, and asking that the Court reverse the decree of dismissal and remit the case for trial, that a "decree in the nature of a Decree of Restitution" may be entered. The Supreme Court, in an opinion filed (R. 2131) 309 Pa. 296, affirmed the decree of the court below and dismissed the appeal, stating, in its opinion (R. 2132):

> "The chancellor found as a fact, upon a consideration of plaintiff's testimony only, 'that the machines are efficient for their intended purpose and that they conform to the requirements of the contract and specifications and the law existing at the time the contract was made; and so finding, we would be required to conclude as a matter of law that the county must pay the balance due' on the contract. He, therefore, reported in favor of dismissing the bill."

The Circuit Court of Appeals made no mention in its opinion of an all-important proposition of law presented by your Petitioner and argued, to wit, that the County is precluded from recovery in this action because it did not comply with the requirements of notice contained in Section 49 of Pennsylvania Sales Act (69 P. S. Sec. 259). In its Petition for Rehearing filed before the Circuit Court, Maryland Casualty asked for a consideration of the question of law concerning notice because if it should be determined in favor of Maryland Casualty, it would require the Court to sustain the judgment below. The Petition for Rehearing was denied on February 8, 1945. Accordingly, Maryland Casualty considers the question as having been determined against it by the Circuit Court and requests certiorari from this Court so that the point may be considered.

The point is that in its charge to the jury, the Trial Court said (R. 1790-1791):

> "It appears from the testimony, and is not denied by plaintiff, that a large number of breaches of contract as claimed by plaintiff were not called to the attention of the Poole Company or defendant. * * * If the giving of notice of defects discovered after bankruptcy would be a vain act, then plaintiff was not required to give such notice to it. The question is whether or not it was, under the circumstances, a vain act."

This was, in our opinion, an erroneous statement of law by the Trial Court. There is no fact issue involved in this point. The only notice given to Maryland Casualty or to Poole, for whom it was surety, was a notice of June 16, 1932 of some six unimportant matters (R. 73-74; 1842), and a notice of December 13, 1932 (R. 75-77; 1851) which was almost eighteen months after the earliest delivery of the machines and more than a year after their use in the elec-

tions. We contend that such notices were not timely within the Pennsylvania decisions.

We argued the point in support of the judgment, appealed from in our favor, under the doctrine well established in *United States and Interstate Commerce Commission* v. *American Railway Express Company*, 265 U. S. 425 and *Story Parchment Company* v. *Paterson Parchment Paper Company*, 282 U. S. 555.

WHEREFOR your Petitioner respectfully prays that a Writ of Certiorari be issued out of this Court directed to the Circuit Court of Appeals for the Third Circuit, to the end that this case may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals may be reviewed and reversed; and that your Petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and just, and thus your Petitioner will ever pray.

MARYLAND CASUALTY COMPANY,

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Counsel for Petitioner.

~~Because of present manpower shortages and illness, we have been unable to complete a brief in support of this Petition at the time of the filing of the Petition, but will file a brief in support thereof as expeditiously as possible.~~

I certify that in my opinion the foregoing Petition is well founded in point of law. It is not filed for delay.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

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No. 1029

MARYLAND CASUALTY COMPANY,
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COUNTY OF ALLEGHENY, a Political Subdivision of the Commonwealth of Pennsylvania.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Circuit Court of Appeals Has Decided Important Questions of Local Law in Manner in Conflict With Applicable Local Decisions and Applicable Local Equity Rules.

The Circuit Court of Appeals held that "With no final adjudication on the meritorious issue involved in *Bassett* v. *Armstrong,* it follows that the judgment in that case does not control the present suit". The Circuit Court further said that there was no specific decision on the exact point by Pennsylvania courts. It is our contention that the mandate in Pennsylvania Equity Rule 66 and the decisions of the Pennsylvania Supreme Court do specifically hold that, under the circumstances of the *Bassett* case, it was finally adjudicated.

Maryland Casualty, as a third separate defense (R. 64), pleaded the *Bassett* case as *res judicata* of the issues in the instant case. It introduced in evidence thereof the complete record of the proceedings and trial in the Court of Common Pleas of Allegheny County before the Chancellor, before the Court *en banc* and before the Supreme Court of Pennsylvania (R. 1917-2150, inc.). At the conclusion of the plaintiffs' evidence in the *Bassett* case, the plaintiffs having rested, counsel for Poole, one of the defendants, moved the Court to dismiss the bill (R. 2070). The Chancellor granted the motion and, in an order filed December 29, 1931, dismissed the bill (R. 2082), and filed an opinion under Pennsylvania Equity Rule 13 giving his reasons for so doing (R. 2078-2082, inc.). The plaintiffs filed exceptions to the decree of dismissal (R. 2084-2092, inc.). Following Pennsylvania practice, the matter then came before the Court *en banc*, and the Court *en banc*, on March 22, 1932, entered an order overruling the exceptions filed by the plaintiffs and affirming the order of December 29, 1931 dismissing the bill (R. 2094). In an opinion filed, it directed the entry of said order as a final decree (R. 2093-2094). Plaintiffs then appealed to the Supreme Court of Pennsylvania, and the Supreme Court, in an opinion filed November 28, 1932, affirmed the decree of the court below and dismissed the appeal (R. 2131-2134).

Under Pennsylvania Equity Rule 66, upon the filing of the exceptions by the plaintiffs to the decree, and the refusal of the Court *en banc* to change the decree, the decree became a final decree for all purposes exactly as if it had been entered after hearing of both parties.

The applicable part of Pennsylvania Equity Rule 66 reads as follows:

> "If exceptions are filed to such a decree, and the court or referee refuses to change it, it shall become

> a final decree for all purposes, and subject to appeal exactly as if it had been entered after a hearing of both parties."

Under the specific mandate of Pennsylvania Equity Rule 66, it was the filing of the exceptions and the overruling of them that created a situation of absolute finality as to the issues tendered by the plaintiffs' complaint, and that finality, according to the explicit language used in Pennsylvania Equity Rule 66, was "for all purposes". The entry of the order of dismissal by the Chancellor had the effect of a nonsuit at law, according to the express language of Equity Rule 66. Had the plaintiff Bassett stopped there, there would be no final determination of the question, but Bassett filed exceptions to the decree of dismissal, and, under Equity Rule 66 in such a case, the decree became final for all purposes as if it had been entered after hearing of both parties.

In *Central Pennsylvania Lumber Co.* v. *Carter,* 348 Pa. 429, 35 Atl. (2d) 282, the Court said:

> "While it is true that the mere entry of a compulsory nonsuit is not *res judicata* (Std. Pa. Prac., Vol. 6, §2); nevertheless, it is otherwise if plaintiff files a motion to set the nonsuit aside, as was done by appellants in the present controversy, and the decision is against him and he fails to take an appeal and secure a reversal."

In *Fine* v. *Soifer,* 288 Pa. 164, 135 Atl. 742, *notwithstanding the plaintiff's claim was never considered on the merits,* the refusal of the Court *en banc* to take off a nonsuit was held by the Pennsylvania Supreme Court to have resulted in a final judgment which barred a later suit. The Court said:

> "Whereas it is not the nonsuit, but the refusal to take it off, which makes the facts involved *res judicata;* * * *"

The Supreme Court of Pennsylvania, in its opinion filed, charaterized the Chancellor's opinion as a finding of fact (R. 2132). The Circuit Court regarded the so-called findings as mere statements. They were at least reasons required under Pennsylvania Equity Rule 13 and they considered the merits.

When the plaintiff Bassett appealed to the Supreme Court of Pennsylvania, that Court affirmed the decree and dismissed the bill, thereby removing all question as to the finality of the order of dismissal. If the Supreme Court of Pennsylvania wanted to avoid the effect of *res judicata,* it would have followed its usual practice of simply dismissing the appeal. *In re Appeal of Sholter et al.,* 325 Pa. 48, 188 Atl. 112; *Werner* v. *King,* 310 Pa. 120, 164 Atl. 918; *Maloney* v. *District No. 1 United Mine Workers of America,* 308 Pa. 251, 162 Atl. 225. Or it could have ordered the Chancellor to vacate the decree and dismiss the bill on the ground that the question was moot. *Leader* v. *Apex Hosiery Company,* 302 U. S. 656.

Accordingly, we have a final order of a Pennsylvania court affirmed on appeal, *Bassett et al.* v. *Armstrong et al.,* 309 Pa. 296, 163 Atl. 525. It should control the instant case.

To dispose of the holding by the Circuit Court of Appeals that section 69(2) of Restatement, Judgments, governs, it need only be pointed out that even if that section does restate properly the Pennsylvania law, it is patently not applicable here. Section 69(2) deals with a case where a party to a judgment *cannot* obtain a decision of an appellate court because the matter determined *against him* is moot. This section is based on the case of *Gelpi* v. *Tugwell* (C. C. A. 1, 1941) 123 Fed. (2nd) 377. (See

example given in Restatement, Judgments, Sec. 69(2), and see also 56 Harv. L. R. 1 (Sept. 1942), an explanatory article written by one of the Reporters for the Restatement). In the *Gelpi* case the losing party was prevented from appealing from a denial of her petition for writ of mandamus to compel her reinstatement to public office, solely because the term of office concerned had expired before the appeal could be heard. A review was thus prevented, and without fault on the part of the party seeking relief. But in the *Bassett* case the fact was otherwise. Mootness did not destroy the right of the County to appeal, because the County never had the right to appeal. Its answer *asked* for the dismissal of the Bassett complaint, and hence the ruling of the Chancellor in granting that request and the action of the court en banc in dismissing the plaintiffs' exceptions were in strict accordance with the county's prayer. It follows that Restatement, Judgments, Section 69(2) was not intended to cover such a situation. Further, under clear rulings of the Pennsylvania Court, one who pursues or is instrumental in inducing a court to make a decree cannot thereafter complain of the decision in an appellate court. *Appeal of Bigham*, 123 Pa. 262, 16 Atl. 613; *Bergman* v. *Straus*, 264 Pa. 439, 107 Atl. 810; *In re Sherwood's Estate*, 206 Pa. 465, 56 Atl. 20.

The application of Section 49 of the Pennsylvania Sales Act.

The requirement of notice of breach of warranty required by the Pennsylvania Sales Act is an absolute one, and the statute makes no exceptions. The giving of the notice is a statutory condition precedent to a statutory right (Williston on Sales (2d Ed.) Sec. 484A, pp. 1259-1260). Where the language of the statute is plain and unambiguous, an exception to the application of the statute should not be

engrafted thereon. *Farmers-Kissinger Market House Co. Inc.* v. *City of Reading, et al.*, 310 Pa. 493, 165 Atl. 398, 400. Nowhere in the Pennsylvania Sales Act appears the slightest intimation that the buyer is excused from giving notice if that would be a "vain act," and no decisions of Pennsylvania courts are brought forward to supply such excuse. On the contrary the Pennsylvania courts have been diligent to require a strict compliance with the notice requirement of the Sales Act. *Crunden Martin Mfg. Co.* v. *Turner*, 274 Pa. 425, 118 Atl. 365; *Aaron Bodek & Son* v. *Avrach*, 297 Pa. 225, 146 Atl. 546, and cases therein cited.

Conclusion.

Here then, we submit, the Circuit Court of Appeals has decided two important points of Pennsylvania law, both without benefit of sustaining Pennsylvania authority, both contrary to the wording and spirit of the pertinent Pennsylvania decisions, one contrary to the express wording of the Pennsylvania Equity Rule involved, and the other contrary to the express wording of the Pennsylvania statutes involved.

It is respectfully submitted that the relief prayed for by the Petition in this case should be granted and a Writ of Certiorari issued, directed to the Circuit Court of Appeals for the Third Circuit.

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COUNTY OF ALLEGHENY, a Political Subdivision of the Commonwealth of Pennsylvania.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES

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COUNTY OF ALLEGHENY, a Political Subdivision of the Commonwealth of Pennsylvania.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now County of Allegheny, respondent, by counsel, and files its Brief in opposition to the petition for writ of certiorari herein, as follows:

COUNTER-STATEMENT OF THE MATTER INVOLVED.

Note: References designated by the letter "R" are to pages of the "Appendix to Brief for Appellant." Those designated by the letters "A.P." are to pages of the printed Additional Proceedings in the court below.

The action was laid upon a bond conditioned for faithful performance of a contract. By its complaint (R. 3), respondent alleged default of the bond by three different varieties of breaches of performance of the

contract and claimed damages suffered by the alleged default in a single sum as consequential to any one of the alleged breaches of performance or to all of them together. By its answer (R. 62), petitioner set up an affirmative defense of *res judicata* as to the first two varieties of alleged breaches of performance and denied the third alleged breach of performance. By order of the trial court (R. 78), respondent filed a reply (R. 79) to said *res judicata* defense. The issues created by the pleadings were tried by jury and resulted in a general verdict for respondent (R. 1806). Thereafter, the trial court entered judgment *n.o.v.* for petitioner (R. 2188) upon a determination, as a matter of law, (a) that the first two varieties of alleged breaches of performance were *res judicata,* and (b) that the verdict was without sufficient support as one rendered in respect of the third alleged breach of performance.

The issues raised by the pleadings in respect to the *res judicata* defense were the following: (1) an issue of law as to whether the case relied upon was adjudicated upon the merits of the issues therein involved; (2) a mixed issue of law and fact as to whether respondent was a party, nominal or real, to the proceedings in the case relied upon; (3) an issue of fact as to whether respondent's rights in respect of the issues tendered in the instant action had matured prior to the proceedings in the case relied upon and could have been adjudicated therein.

Respondent appealed (R. 2193) to the Circuit Court below from the judgment *n.o.v.* By its statement of points relied upon (R. 2193-4), respondent attacked the appealed judgment as error upon the grounds: (1) that the branches of respondent's claim based upon the first

two varieties of alleged breaches of performance were not *res judicata* by the evidence touching the case relied upon; (2) that the verdict found legally sufficient evidentiary support as one rendered in respect of the third alleged breach of performance; and (3) that the entry of the appealed judgment was not within the power of the trial court in the procedural circumstances of the record, which showed no motion for a directed verdict in respect of the third alleged breach of performance.

The Court below reversed the appealed judgment (A.P. 58). Its opinion (A.P. 48-57) deals only with the *first* ground of respondent's attack thereagainst above stated. It does not in any way dispose of the *other two* grounds of attack. The opinion discloses (A.P. 50) a complete comprehension by the Court of the above stated issues raised by the pleadings as regards the *res judicata* defense. However, the Court found it necessary to deal with only one of those issues, i.e., the question of law as to whether the case relied upon by petitioner as *res judicata* was decided upon the merits of the issues therein involved. The Court ruled that question of law against petitioner. At the close of its opinion (A.P. 57), the Court expressly stated that its ruling on said question of law rendered unnecessary any consideration of respondent's "other points on the question of *res judicata*". These other points were that the *res judicata* issues (2) and (3) above mentioned had been determined by the verdict, which was binding upon the trial judge (*Berry v. United States*, 312 U. S. 450). (The opinion inadvertently omitted to state the non-necessity for consideration of the remaining grounds of respondent's attack upon the appealed judgment independently of the *res judicata* question).

By way of its brief filed in the Court below, petitioner affirmatively introduced into respondent's appeal an argument to the effect that the appealed judgment was supportable, as a matter of law, upon the ground that respondent failed to give petitioner's principal (the party seller in the sales-contract for the faithful performance of which the bond in suit was given) such notice of its breach of warranties (the first and second varieties of breaches of performance alleged by respondent in the instant action) as is required by § 49 of the Pennsylvania Sales Act. In answer thereto, respondent filed a reply brief in the Court below contending (1) that petitioner's liability on the bond in suit is not predicated upon any notice to petitioner's principal under § 49 of the Sales Act, and (2) that if respondent's compliance with § 49 of the Sales Act is a condition precedent to petitioner's liability upon the bond in suit, any question of sufficient compliance was for the jury in the trial court. The Court below made no disposition in its opinion of the point thus affirmatively introduced by petitioner as in support of the appealed judgment. In a petition for rehearing filed below (A.P. 63-84, particularly 68-72), petitioner complained of the failure of the Court to have considered the point. Its said petition for rehearing was denied (A.P. 86).

When the trial court entered the appealed judgment *n.o.v.*, it also granted petitioner a new trial conditionally as an alternative or *succedaneum* in the event of a reversal of the judgment *n.o.v.* (R. 2188). This event, as above stated, has occurred.

ARGUMENT.

I.

Analysis of the Questions Presented and the Reasons Relied On for Allowance of the Writ.

The form of the petition appears to violate Rule 38, par. 2, by combining the questions presented and the reasons relied on rather than by making a separate statement of each as required by the rule.

The *questions presented* appear to be the following:

(1) Whether the ruling below in reversal of the appealed judgment is in conformity with Pennsylvania law in respect to the question of law decided, viz., that the case relied upon for the *res judicata* defense was not adjudicated upon the merits of the issues therein involved.

(2) Whether, in refusing petitioner's application for rehearing, the Court below made a ruling not in conformity with Pennsylvania law as regards petitioner's point that the appealed judgment *n.o.v.* is supportable, as a matter of law, upon the extrinsic ground that respondent failed to comply with the provisions of § 49 of the Pennsylvania Sales Act.

The *reason relied* on for allowance of the writ appears to be that the Court below has decided important questions of Pennsylvania law (viz., the above stated questions) in a way probably in conflict with applicable Pennsylvania decisions.

The argument to follow will be addressed primarily to the reason relied on. It will show that the reason is

not sufficiently substantiated to warrant exercise of the discretionary power of this Court to grant certiorari for consideration of the questions presented. The argument will also show that the questions presented are not *solely* decisive of the rectitude of the appealed judgment *n.o.v.* or of the rectitude of the order below in reversal thereof, but that, on the contrary, any review of the order of reversal below granted by this Court on certiorari would necessarily embrace not only the single point decided below but also all of the other grounds upon which respondent attacked the appealed judgment *n.o.v.* and which were left undecided below.

II.

As applied to the first question presented, the reason relied on is unsubstantiated.

(1) Petitioner's argument discloses a basic misconception of clear Pennsylvania law. It contends that, because Pennsylvania Equity Rule 66 permits an appeal from the refusal of a court *en banc* to change a decree of dismissal entered by a chancellor at the close of a plaintiff's evidence, such an appeal necessarily requires the appellate court to adjudicate the merits of the issues below and that the judgment of the appellate court constitutes such an adjudication. This contention of petitioner *disregards entirely Pennsylvania Equity Rule 13* and its effect in such appeals. The relevant part of said Rule 13 expressly provides as follows:

> "When the court * * * refuses to change a decree of dismissal, * * * it shall file a statement of the reasons for its action."

Consequently, in the appeal provided for by Rule 66, the question involved is the rectitude *of the reasons* stated by the court *en banc* below in support of its action in refusing to change the chancellor's decree of dismissal. Those reasons *may* or *may not* go to the merits of the issues below. In the *Bassett* case, the reason *did not* go to the merits, as is plainly evident by the statement (R. 2093) filed by the court *en banc* in compliance with said Rule 13.

(2) The Circuit Court below in the instant case applied clear Pennsylvania law. A review of the record in the *Bassett* case in the light of indubitable Pennsylvania law applicable to that record at the various stages of importance to the question presented here by petitioner follows:

> The motion for dismissal made when the taxpayer plaintiffs rested was the counterpart of a motion for involuntary nonsuit in an action at law: *Pennsylvania Equity Rule 66.* The only thing before the chancellor in his consideration of that motion was whether plaintiffs' evidence sustained the case made out by the bill: *Gordon v. Gordon,* 277 Pa. 53, 55. When the chancellor decided that motion, he did not make an "adjudication" under Pennsylvania Equity Rule 67 consisting of formal findings of fact, conclusions of law, and decree *nisi;* he merely acted upon the motion and filed an opinion in explanation of his action. His dismissal of the bill did not make the issues in the action *res judicata: Sauber v. Nouskajian,* 286 Pa. 449, 453. The "exceptions" to his order of dismissal were analogous to a motion to remove a nonsuit at law: *Thomas v. Borden,* 222 Pa. 184; *Gordon v. Gordon,*

supra. By filing their "exceptions", the taxpayer plaintiffs submitted the legal sufficiency of their case to the court *en banc* with the same effect as though the defendants had demurred to the evidence: *Altsman v. Kelly*, 336 Pa. 481, 488. The court *en banc* refused to change the chancellor's order of dismissal. When a court *en banc* refuses to change a chancellor's order of dismissal, it is obliged to file a statement of the reasons for its action: *Pennsylvania Equity Rule 13.* The court *en banc* complied with that rule by opinion filed. Examination of that opinion shows conclusively that the court *en banc* in no way whatsoever passed upon the sufficiency of the plaintiffs' evidence in support of their bill, as upon a demurrer by defendants to the evidence, but that it refused to change the chancellor's order of dismissal for the sole reason that the issues in the case before it had become moot by the payment of the money which the bill was brought to prevent. Accordingly, the final decree of dismissal was not entered upon the merits but was entered, as expressly stated by the court *en banc,* solely because any question involving the merits had become moot. And that it was so entered for that reason was expressly recognized by the Supreme Court of Pennsylvania when the appeal from that final decree came before it. The Supreme Court held the decree to have been properly entered for that sole reason. The Supreme Court both affirmed the decree below and dismissed the appeal. The *decree was affirmed* because it was appropriate as within the remaining power of the court below. The *appeal was dismissed* because it had been taken in a fictitious and moot case.

(3) It is clear Pennsylvania law that, when a decree in equity is relied upon as *res judicata* of instant litigation, it is necessary for the trial court to examine the proffered record for the purpose of discovering whether the decree was entered upon the merits or was founded upon a reason not involving the merits: *Moser v. R. R. Co.*, 233 Pa. 259, 270; *Larkins v. Lindsay*, 205 Pa. 534, 535. The error of the trial court in the instant case lay in its failure to apply that rule of Pennsylvania law. The Circuit Court below applied the rule and corrected the error of the trial court. In doing so, the Court below applied clear Pennsylvania law.

(4) The Pennsylvania decisions cited by petitioner in its Brief do not becloud Pennsylvania law. Nor do they support petitioner's contention that the ruling of the Court below is in conflict with applicable Pennsylvania decisions. They are easily disposed of:

(a) The decision in *Central Pa. Lumber Co. v. Carter*, 348 Pa. 429, as clearly shown in the report, is based upon the failure of the appellant therein to have appealed in the prior action from the refusal of the trial court to set aside the nonsuit entered therein. The report is totally silent as to why the trial court in the former action had entered its order of refusal. The Supreme Court therefore had the right to assume, as it quite apparently did, that said order of refusal was entered in the usual course of such proceedings, i.e., *after* a consideration by the trial court of plaintiff's evidence as upon a demurrer thereto by defendant. There is certainly nothing in the report to indicate anything to the contrary. Consequently, petitioner evidences a complete misunderstanding of the cited case.

(b) The report in *Fine v. Soifer,* 288 Pa. 164 clearly shows that petitioner is in error when it makes the flat statement, on p. 3 of its Brief, that the plaintiff's claim therein sued upon "was never considered on the merits". In the previous action in the same trial court on the same claim, plaintiff had been nonsuited and had moved the court to remove the nonsuit, and the trial court *en banc,* in passing upon that motion, had presumptively reviewed plaintiff's evidence as on a demurrer thereto by defendant. So held the Supreme Court. Consequently, the judgment refusing to remove the nonsuit was one entered after a consideration of the merits of plaintiff's case as presented in evidence. Not having been appealed, that judgment became conclusive and made the facts involved *res judicata.* Thus, petitioner evidences a misunderstanding of this cited case also.

(c) Petitioner cites the *Sholter* case, 325 Pa. 48, the *Werner* case, 310 Pa. 120, and the *Maloney* case, 308 Pa. 251, as examples of what the Supreme Court of Pennsylvania does when it wants "to avoid the effect of *res judicata*". Just how petitioner arrives at any such conclusion is incomprehensible. Not one of these cases exemplifies anything of the kind. They do exemplify the usual practice of that Court when, as happened in each of the cited cases, the issues in a case at its bar had become moot *after the appeal was taken.* In such cases, the Supreme Court simply dismisses the appeal.

At p. 8, *supra,* we pointed out why the Supreme Court *affirmed the appealed decree* in the *Bassett* case and why the *appeal was dismissed* by that Court. Petitioner stubbornly refuses to under-

stand those actions by that Court. But the Circuit Court below understood them perfectly. The affirmance of the appealed decree *does not* control the instant case as *res judicata*. It simply approved the action of the court *en banc* below in dismissing the bill because the issues tendered had become moot while the case was in *that court*.

(5) Petitioner's laborious argument regarding the reference by the Court below to *A.L.I. Restatement of the Law of Judgments*, § 69 (2), is altogether pointless. It disregards entirely what is said in that eminently respectable authority under Comment (d):

"d. *Where a matter has become moot.* Where a judgment has been rendered against a party by a court of first instance, and on his appeal the appellate court refuses to review the proceedings because the controversy has become moot, the judgment is not binding in a subsequent action between the parties based upon a different cause of action.

Illustration:

1. A brings a mandamus proceedings against B, a public official who has removed A from a public office for alleged misconduct of A, seeking reinstatement. After a trial of the question whether A was guilty of such misconduct as to justify his removal from office, the court finds that he was guilty and gives judgment for the defendant. A appeals from the judgment, but before the appeal is heard his term of office expires, and the court dismisses the appeal on the ground that the controversy has become moot. Thereafter A sues B for damages for wrongfully removing him from office. The judgment in the prior action is not con-

clusive on the question whether A was guilty of such misconduct as to justify his removal."

The foregoing Comment and Illustration are directly applicable to the stage in the *Bassett* case proceedings when the decision of the chancellor was before the court *en banc*. The chancellor was the "court of first instance", and the court *en banc* was "the appellate court". The latter's refusal to review the chancellor's decision was "because the controversy has become moot". Petitioner simply fails to observe the precise analogy of the situation to that of the Comment and Illustration. Consequently, petitioner does not recognize the clear applicability of said § 69 (2) of the *Restatement*.

Petitioner's argument points to no Pennsylvania decision whatsoever in conflict with said § 69 (2) of the *Restatement* or with said *Comment (d)* thereto appended. Instead, petitioner contents itself by saying that said § 69 (2) "is patently not applicable here" and by proceeding with its labored argument in utter disregard of the relevant *comment* and *illustration* above quoted. Consequently, petitioner never even reaches its burden to show that the decision of Court below is in conflict with applicable Pennsylvania decisions so far as § 69 (2) of the *Restatement* is concerned.

(6) Wherefore, we submit that, as applied to the *first question* presented by the pending petition, the reason relied upon for allowance of the writ fails to move the discretionary power of this Court to grant certiorari for a review of that question.

III.

As applied to the second question presented, the reason relied upon is equally unsubstantiated.

(1) The Court below was entirely justified in refusing petitioner's application for rehearing as regards the point raised in its brief to the effect that the appealed judgment *n.o.v.* is supportable upon the extrinsic ground that respondent had failed to comply with § 49 of the Sales Act. In so refusing, the Court below made no ruling in conflict with applicable Pennsylvania decisions, as will now be shown.

(2) Section 49 of the Sales Act operates upon *contracts of sale.* It *does not* operate upon the *bond in suit.* This bond is conditioned for *performance of the contract.* It is not a bond of *indemnity against damages* suffered by *breach* of the contract. It was concerned only with the duty of petitioner's principal to *perform* its sales-contract and contemplated but two situations, —the performance or non-performance of that duty: *Mechanics Trust Co. v. Fid. & Cas. Co.,* 304 Pa. 526, 534. The condition of the bond is performance of a specific thing, and the only alternative for performance is the bond itself: *Purdy v. Massey,* 306 Pa. 288, 294. By becoming surety on this bond, petitioner is bound by its terms and cannot seek refuge in its principal's conditional liability as a seller under § 49 of the Sales Act, a liability which is totally immaterial to the obligation of this bond. The liability of a surety to an obligee is governed solely by the terms of the bond establishing privity between them: *Mechanics Trust Co. v. Fid. & Cas. Co., supra.* A right to notice of default of the obli-

gation of a bond is founded upon a special provision therefor in the bond and does not attach to the bond in the absence of such a provision: *School Dist. v. Lewis et al,* 101 Pa. Superior Ct. 583. The bond in suit contains no such provision.

Consequently, petitioner's liability upon the bond in suit is not predicated upon notice to petitioner's principal under § 49 of the Sales Act. When, at petitioner's insistence and over respondent's protest, the trial court required respondent to "produce evidence of such notice as has been given to the principal or surety in this case" (R.353), the trial court committed plain error fortunately cured by the verdict.

(3) Upon the record in this case, petitioner's point *was not raisable* in the Court below as *one of law* in support of the appealed judgment. Had petitioner considered the question as one of law, it *could* and *should* have raised the point by a motion in the trial court for a directed verdict based upon that specific ground. Instead, however, petitioner chose to consider the question as *one of fact* and presented its requests (10), (11), (12), and (13), all of which were affirmed and read into the charge of the trial court (R. 1785). Having thus made its bed, petitioner must lie in it.

(4) Petitioner's "vain act" argument *is not available* to it for the advanced purpose of justifying the appealed judgment. That argument is founded upon a contention of error in the charge of the trial court and in the admission of incidental evidence giving rise to the charge. But the propriety of entering a judgment *n.o.v.* is determinable by *the state of the record at the close of the trial* without any consideration of alleged

errors pertaining to evidence or the charge: *Kotlikoff v. Master,* 345 Pa. 258, 265; *Murphy v. Wolverine,* 155 Pa. Superior Ct. 125, 130; *Heffron v. Prudential Ins. Co.,* 137 Pa. Superior Ct. 69, 72.

(5) Regardless of petitioner's "vain act" argument (which, in any event, could have application *only* to such notices as were *not given*), any question of respondent's sufficient compliance with § 49 of the Sales Act was one peculiarly for the jury and is not determinable as a matter of law.

If all breaches of which no specific notice was given were eliminated from the case, the fact remains that some notices *were given.* That of June 16, 1932, gave notice of a number of breaches, including the very important one relating to the endorsed candidate mechanism (R. 1842). That of December 13, 1932, notified as to breaches concerning secrecy in the conduct of voting, multiple voting, inability of the voter to change his vote, inaccuracy in the recording and registering of votes, etc., (R. 1842). That of March 4, 1933, invited participation in the preparation for correction of defects (R. 1843). That of July 2, 1934, gave notice of the fact that the machines were then undergoing alterations and repairs to make them conform to the requirements of the contract (R. 1844).

When the principal amount of the verdict ($200,000) is compared with the total amount of damages proved (over $850,000), it is at once apparent that the verdict could easily have rested upon the actually given notices alone. Who is to say that it did not? That there is sufficient evidence to sustain such a finding is not open to question.

(6) It remains only to add that petitioner is in no position to advance its argument for its own benefit. Petitioner itself received each of the above mentioned notices. It chose of its own volition not only to disregard them entirely but also to deny expressly, by its own letters, any liability whatsoever in spite of them.

IV.

The questions presented are not solely decisive of the rectitude of the order below in reversal of the appealed judgment.

As shown in our "Counter-Statement of the Matter Involved" (see p. 3, *supra*), the decision of the Court below was based upon consideration of only *one* of *five grounds* of respondent's attack upon the appealed judgment *n.o.v.* Its order of reversal (A.P. 58) is a *general* one. No review of that order would be complete without a consideration of the other *four grounds* upon which respondent attacked the appealed judgment. Hence, the questions presented by the pending petition are not *solely* decisive of the rectitude of that order. Consequently, this Court should not grant certiorari for consideration of the questions presented.

V.

Conclusion: The petition should be denied.

Upon the foregoing argument in opposition to the petition, respondent respectfully contends that the petition should be denied.

Respectfully submitted,

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